

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0426-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

LEONARD BENDLIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
RONALD S. GOLDBERGER, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ The State of Wisconsin appeals from an order suppressing statements made by the seventeen-year-old defendant, Leonard Bendlin, who was charged with possession of a dangerous weapon while under eighteen years of age in violation of § 948.60(2)(a), STATS. The State argues that

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

the totality of the circumstances did not subject the defendant to custodial interrogation and, therefore, any statements made to the police were completely voluntary and did not require *Miranda* warnings. Because the circumstances of this case did involve custodial interrogation of the defendant and did require *Miranda* warnings before the officers asked the defendant questions upon their return to the hospital, this court affirms the trial court's order suppressing Bendlin's statements that were made to police detectives on June 25, 1997.

I. BACKGROUND

At approximately 4:00 a.m., on June 25, 1997, Detectives Ronald Laura and Kevin Armbruster were dispatched to investigate a shooting on South 17th Street in Milwaukee. The detectives were told that an individual had been shot in the hand. When the detectives arrived at the scene, the individual who had been shot, Bendlin, had already been transported to the hospital by ambulance.

While still at the scene, the detectives interviewed two witnesses, a friend and the sister of Bendlin. These witnesses stated that an unknown male had approached Bendlin, said something, and shot Bendlin in the hand which the victim had raised in the air. After taking these reports of the shooting, the detectives requested and received consent from Bendlin's mother to search the house because they still "suspected based on the description of the injuries that this could also be a self-inflicted gunshot wound." While searching the residence, the detectives found one .22-caliber cartridge but no weapons.

The detectives then left the house on 17th Street and traveled to St. Francis Hospital, where the paramedics had taken Bendlin. Initially, the detectives met with the treating hospital personnel to review Bendlin's charts. Detective Laura concluded that "[I]t was obvious among other things that the weapon was

fired at close range.” The detectives then spoke to Bendlin while his mother was in the room. Although Bendlin told the detectives a similar story, they decided to reinterview the other witnesses because “some information ... led us to believe some of the things they were telling were not true.” The detectives left the hospital at this time, but two uniformed officers remained in the hospital emergency room area “for the victim’s protection and just to keep control of the investigation.”

The detectives returned to the scene on 17th Street and reinterviewed Bendlin’s sister. She changed her original story stating that she had not been present when her brother was shot. This new information “led [the detectives] to believe [they] weren’t told the truth regarding this incident.” The detectives then decided to reinterview Bendlin at the hospital and confront him with this new information.

Without Bendlin’s mother in the room, Detective Armbruster confronted the defendant with these inconsistencies. The defendant responded by admitting that, while playing with a revolver, he had shot himself in the hand. This second interview occurred while the defendant was receiving medical treatment in a curtained-off area of the emergency room, with only the defendant and Detective Armbruster present. Detective Laura, Bendlin’s mother, and the two uniformed officers were waiting outside of the curtain area. Detective Armbruster concluded that Bendlin had told the truth at “the first opportunity that his mother wasn’t in the room,” because “he was frightened of her.”

After a conference in another section of the hospital, the detectives ordered Bendlin to meet with a member of the district attorney’s office to determine charges. On June 25, 1997, the State charged Bendlin with possession

of a dangerous weapon while under eighteen years of age in violation of § 948.60(2)(a), STATS.

Bendlin moved to suppress the statements he made during the second interview. The trial court granted the motion, ruling that under the totality of the circumstances, an “in custody” situation had been created, which requires *Miranda* warnings. An order was entered suppressing the statements. The State now appeals.

II. ANALYSIS

The question in this case is whether the statements made by Bendlin, in response to the questions asked by Detective Armbruster at the second interview, are inadmissible because the questions were not preceded by *Miranda* warnings. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966). “Whether a person is in custody for *Miranda* purposes is a question of law to which a reviewing court owes no deference to the trial court’s determination.” *State v. Buck*, 210 Wis.2d 115, 124, 565 N.W.2d 168, 171 (Ct. App. 1997) (citation omitted). Therefore, this court’s review of the trial court’s determination that Bendlin was “in custody” is *de novo*. See *State v. Clappes*, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987).

Miranda held that the prosecution could not use statements resulting from custodial interrogation of a defendant. See *Scales v. State*, 64 Wis.2d 485, 489, 219 N.W.2d 286, 289 (1974). Custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. In *Miranda*, the Supreme Court was mainly concerned with the “restricted and coercive atmosphere when the defendant is accompanied only by

the police and is in isolation from others” *State v. Clappes*, 117 Wis.2d 277, 282, 344 N.W.2d 141, 144 (1984).

However, a person need not be under formal arrest to be in a custodial interrogation requiring *Miranda* warnings. See *State v. Pounds*, 176 Wis.2d 315, 322, 500 N.W.2d 373, 377 (Ct. App. 1993). To determine whether an individual is in custody requiring *Miranda* warnings, “[t]he test is whether a reasonable person in the defendant’s position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.” *Id.* at 321, 500 N.W.2d at 376 (internal quotation marks and citation omitted).

In evaluating these circumstances, the totality of the circumstances must be considered when determining whether a suspect is in custody for the purpose of triggering *Miranda* protections. See *California v. Beheler*, 463 U.S. 1121, 1125 (1983). An examination of the totality of the circumstances includes: (1) “[t]he defendant’s freedom to leave the scene and the purpose, place and length of the interrogation,” *State v. Leprich*, 160 Wis.2d 472, 477, 465 N.W.2d 844, 846 (Ct. App. 1991); (2) “whether the police officers know or have reason to believe that a crime has been committed,” *Mikulovsky v. State*, 54 Wis.2d 699, 719-20, 196 N.W.2d 748, 758-59 (1972); (3) “what has been communicated by the police officers, either by their words or actions,” *State v. Swanson*, 164 Wis.2d 437, 447, 475 N.W.2d 148, 152 (1991); and (4) “the absence of a parent or guardian,” *Theriault v. State*, 66 Wis.2d 33, 44, 223 N.W.2d 850, 855 (1974).

All of these coercive factors were present in this case. When the police detectives arrived at the hospital to interview the defendant for the second time, Bendlin did not have the freedom to leave the scene of the interrogation. While undergoing treatment in the hospital emergency room, “[t]he defendant was

as effectively bound to his bed as if he had been shackled to it.” *Scales*, 64 Wis.2d at 492, 219 N.W.2d at 291. In addition, although it is not clear from the record whether the defendant was able to see the two uniformed police officers who remained at the hospital, this court concludes that a reasonable person in the defendant’s position would have considered his freedom to leave the hospital seriously impaired by these two armed guards.

Secondly, the detectives already had “reason to believe that a crime ha[d] been committed.” *Mikulovsky*, 54 Wis.2d at 719-20, 196 N.W.2d at 758-59. Based only upon the description of the wound, the detectives initially suspected that the injury was self-inflicted. After the detectives had interviewed witnesses, interviewed the defendant, determined that the weapon was fired at close range, determined that there was gun residue on the defendant’s hand, and reinterviewed the defendant’s sister, they decided to reinterview Bendlin because they “didn’t believe he was telling the truth.” This additional information clearly led the detectives to believe that the defendant had lied to them regarding the nature of his wound. At this point, before the second interview, the officers could have arrested the defendant and, at the least, had “reason to believe that a crime has been committed.” *Id.*

Finally, Bendlin’s admission was obtained only after his mother had left the room. Absence of a parent or guardian does not render a juvenile’s confession *per se* involuntary, however, such absence is one factor to be considered under the totality of the circumstances. *See Theriault*, 66 Wis.2d at 38-43, 223 N.W.2d at 852-54. “The emphasis of *Miranda* ... is upon the necessity of extending constitutional rights to persons in the presence of overwhelming police power and who are cut off from contact, for the time being at least, from family, friends, and counsel.” *Scales*, 64 Wis.2d at 491-92, 219

N.W.2d at 290. Our supreme court recognized in *Theriault* that “confessions of juveniles involve special problems that may require authorities to use different techniques ... and that require courts to use the ‘greatest care’ in assessing the validity of the confession.” *Id.* at 39, 223 N.W.2d at 852. The tactics used by the detectives in the present case do not address any of the special problems involved with juvenile confessions. The fact that Detective Armbruster consciously chose to question Bendlin while his mother was out of the room, for whatever reason, only adds to the totality of the circumstances which lead this court to conclude that the techniques used by the detectives, combined with the atmosphere in the emergency room, created a custodial situation requiring *Miranda* protections.

Based on the totality of the circumstances, which include the absence of a parent or guardian, Bendlin’s limited freedom to leave the scene, the purpose and place of the interrogation, what had been communicated by the armed guards’ presence, and the fact that the police detectives had reason to believe that a crime had been committed, this court holds that a reasonable person in Bendlin’s position would have considered himself to be in custody, given the degree of restraint under the circumstances.

Therefore, the statements made by Bendlin in response to the questions asked by Detective Armbruster at the second interview are inadmissible because the questions were not preceded by *Miranda* warnings.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

